82-989

No. -

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In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

LUIGI MANOCCHIO,
PETITIONER,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

ANTHONY M. TRAINI,
LEPPO & TRAINI,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 742-1213

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Questions Presented.

1. Does a criminal defendant, indicted in a capital case in 1969, have a right, whether substantive or procedural, under the Fifth, Sixth, and/or Fourteenth Amendments to the United States Constitution, or under Article I, § 10 of the Rhode Island Constitution, to challenge the composition of the grand jury that returned the indictments, and, concomitantly, a right to indictment by a constitutionally composed grand jury, where the Rhode Island Supreme Court held in 1979 that all state grand juries empanelled after January 21, 1975 were unconstitutionally composed within the meaning of *Taylor* v. *Louisiana*, 419 U.S. U.S. 522 (1975), but where the case was pending trial on the date [January 21, 1975] of the *Taylor* v. *Louisiana*, *supra*, decision?

2. If the defendant has such a right as described above in question one (1), can that right be waived at all, and, if so, does the defendant waive such right by voluntary absence from the jurisdiction prior to arraignment?

No. - .

In the
Supreme Court of the United States.

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STATE OF RHODE ISLAND,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

Petition for Writ of Certiorari.

Petitioner prays that a writ of certiorari issue to the Supreme Court of Rhode Island, to review said court's erroneous decision of federal constitutional questions. Denial of this petition will subject the petitioner to a criminal trial for a capital offense pursuant to unconstitutional grand jury indictments.

Opinion Below.

The opinion of the Rhode Island Supreme Court is reported *sub nom. State* v. *Luigi Manocchio*, 448 A.2d 761 (R.I. 1982), and is reproduced in the appendix at 1a, *infra*.

Statement of Grounds for Appeal.

The decision of the Rhode Island Supreme Court was entered on July 23, 1982. The petitioner filed a petition to reargue on July 29, 1982. The petition for reargument was denied on September 23, 1982.

The petitioner has no avenue of appeal available except to this Honorable Court.

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1257(3), and the Rules of the United States Supreme Court 17.1(b) and (c).

Constitutional Provisions.

United States Constitution.

The Fifth Amendment to the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RHODE ISLAND CONSTITUTION.

Article I, § 10.

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusations, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to

have assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Statement of the Case.

The petitioner, Luigi Manocchio, was indicted on August 14, 1969, for conspiracy to murder and two counts of accessory before the fact to murders committed in April, 1968. The original proceedings, including what took place in the petitioner's absence, undisputed in *State* v. *Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973), are as follows:

The murders in this case were committed on April 20, 1968. The indictments were not returned until June 2, 1969, fourteen months later. The petitioner here is not alleged to have fled until August of 1969. Five defendants named in the indictments — Patriarca, Fairbrothers, Lerner, Rossi and Sciarra — were charged with conspiracy to murder one of the victims (Marfeo) in indictment numbered 69-769; Patriarca and Sciarra were charged in indictment numbered 69-767 with being accessories to that murder, while Lerner, Fairbrothers and Rossi were charged in that same indictment with the murder itself. In the third indictment, 69-768, Patriarca and Sciarra were again charged with being accessories, this time to the murder of the other victim (Melei), while Lerner, Rossi and Fairbrothers were again charged with the murder itself. Two other defendants, Manocchio (the petitioner here) and Vendituoli were charged as co-conspirators in the conspiracy indictment (69-769) and as accessories in the other two indictments (69-767 and 69-768), but were referred to, respectively, as Richard Roe and William Doe throughout the trial,

but were both absent from the jurisdiction at the time of the first trial.

In the first trial, in 1970, the jury found only Lerner guilty of murder on the two substantive indictments, but could not reach any verdict as to any of the other defendants on those two indictments after three days of deliberations. The jury did find all the defendants guilty of the conspiracy indictment.

At the second trial, in 1971, the defendants as to whom verdicts could not be reached at the 1970 trial were retried together (but without Patriarca, whose case had been severed) on the same charges as in the 1970 trial, with one important change: by the time of the 1971 trial, Vendituoli had returned to Rhode Island, been arraigned, and went to trial with the others in 1971. At this trial, all the defendants were found not guilty of the murder and accessory charges. The State thereafter declined to prosecute Vendituoli on the conspiracy charge. At a third trial, in 1972, Patriarca was individually retried on the accessory charges and acquitted.

The grand jury which indicted him excluded members of the college and university academic community. The petitioner voluntarily absented himself from Rhode Island from approximately August 1969, to July 1979. On July 6, 1979, the petitioner voluntarily appeared, was arraigned, and entered a plea of "not guilty". The petitioner then filed a timely motion to dismiss the indictment in conformity with Rhode Island Superior Court Rules of Criminal Procedure 12(b)(3). On August 1, 1979, in *State* v. *Jenison and Cory*, 405 A.2d 3 (R.I. 1979) the Rhode Island Supreme Court held the state grand jury selection system unconstitutional within the meaning of *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). On June 11, 1980, the Rhode Island Supreme Court held in *State* v. *O'Coin*, 417 A.2d 310 (R.I. 1980) that any indictment returned after the date of *Taylor* v. *Louisiana* [January 21, 1975], was invalid and that no conviction based on any such

indictment which was not final by June 11, 1980 could stand. After hearing, the Rhode Island Superior Court certified the following three questions of law to be determined by the Supreme Court of Rhode Island:

> "1. Does a defendant indicted in 1969 have a right, whether it be contained in the fair and impartial jury trial clause or the confrontation clause of the Sixth Amendment to the United States Constitution, or in the due process clauses of the Fifth and/or Fourteenth Amendments to the United States Constitution, or in the equal protection clause of the Fourteenth Amendment to the United States Constitution, or in the provisions of Article I, section 10 of the Constitution of the State of Rhode Island, to challenge the composition of the grand jury that returned the indictment?
> "2. If the defendant has such a right as described in Question 1 above, to challenge the composition of the grand jury that returned the indictment, does he waive that right by voluntarily absenting himself from the jurisdiction prior to arraignment and trial?
> "3. Is a defendant entitled to the benefit of the retroactive application of the [Rhode Island Supreme] Court's decision in the cases of *State* v. *Jenison* and *State* v. *Cory*, notwithstanding that Court's decision in *State* v. *O'Coin*, if the defendant otherwise meets Federal or State criteria for retroactive application of a decision conferring substantive due process rights upon defendants?"

Based upon these questions, the Rhode Island Supreme Court issued its opinion on July 23, 1982. The Court answered Questions One (1) and Three (3) negatively and did not reach Question Two (2). On July 29, 1982 the petitioner filed a petition for re-argument, which petition was denied on September 23, 1982.

Stage at Which Federal Questions Raised.

By way of petitioner's motion to dismiss the indictments filed in the Superior Court of Rhode Island, the federal questions were first raised at the trial court level, after arraignment but before jeopardy attached by way of trial. By way of certification, the questions were also raised in the Rhode Island Supreme Court.

Argument.

The opinion of the Rhode Island Supreme Court p. 1a, *infra*, misconstrued its own two-prong test of *State* v. *O'Coin*, 417 A.2d 310 (1980), in its inapplicability to the facts of the present case. At p. 6a, *infra*, of said opinion the Court stated: "As noted, *O'Coin* set forth a two-pronged test for the retroactive application of *Jenison*. To avail oneself of a *Jenison* challenge, a defendant must satisfy both prongs of the test."

The petitioner contends, that *State* v. *Jenison*, 405 A.2d 3 (R.I. 1979), not *State* v. *O'Coin*, 417 A.2d 310 (R.I. 1980), is the generally applicable case, and that its applicability is *restricted* by *O'Coin only* if the two-prong test is met. Therefore, it is *O'Coin* that is inapplicable to the instant case, and it is unnecessary to reach the question of retroactivity at all. This is true because it is the *finality of conviction* that determines whether retroactivity is in issue. There is no question that any case that is pending when a new constitutional standard is announced and has a bearing on the case, is subject to that constitutional standard's being *currently* applied, *not* retroactively applied.

In *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965), this was exactly the question faced by this Honorable Court, wherein "final conviction" was determined to mean that any available appeals had been exhausted or had lapsed.

The rationale for the opinion in *Linkletter* is peculiarly applicable to the instant case. In *Linkletter*, this Court drew for its basis on the historical rule expounded by Blackstone (1 Blackstone, Commentaries 69 (15th ed. 1809)) and held to be the law in *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886):

> [that unconstitutional action] confers no rights; it imposes no duties; it affords no protection; it creates no office; *it is, in legal contemplation, as inoperative as though it had never been passed.* (Emphasis added.)

Exactly the same point is applicable here. When the Rhode Island Supreme Court held in *State* v. *Jenison*, *supra*, that the grand jury selection process was unconstitutional, it was as though the exclusion provision of the Rhode Island Constitution had never existed except with respect to cases that had already been *finally decided* prior to the provision's being held unconstitutional. (See, *Linkletter*, *supra*, at 381 U.S. 636.)

In considering the effect of retrospective application of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court in *Linkletter* said

> [t]he thousands of [search and seizure] cases that were *finclly decided* on [the law as it existed prior to *Mapp*] cannot be obliterated. . . . Here "prior determinations *deemed to have finality* and acted upon accordingly" have "become vested." (Emphasis added.)

Linkletter, 381 U.S. at 636.

This is again particularly apposite to the instant case because *Mapp* presented a situation where a right was found to exist in the due process clause of the Fourteenth Amendment to the United States Constitution. Therefore, the same considerations raised in *Linkletter* are relevant here. And, as was said in Linkletter, "[i]t was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." 381 U.S. at 639.

So too with the present case. The rule was changed by the decision of the Rhode Island Supreme Court in *Jenison*, *supra*, on August 1, 1979. Therefore, that is the crucial date. As long as any conviction had not become final by August 1, 1979, the new rule should be currently applicable. *Linkletter*, *supra*. In the present case, not only has any conviction not become final, *there is no conviction at all.* In fact, the case has not even been tried.

The procedure that should be followed in this case is that the indictments should be dismissed and the matter presented to a properly constituted grand jury for re-indictment. (There is no basis for, and the petitioner does not here assert, that re-indictment under these circumstances is barred by any valid double jeopardy claim.) Lest the issue be misconstrued, it should be noted that all the petitioner seeks is enforcement of the right to have probable cause, if any, found by a constitutionally composed grand jury. The application of the *O'Coin* decision is therefore questionable, because the *Linkletter* line of cases would, in effect, consider *Jenison* applicable to any case *pending when the new constitutional rule is announced.* (This is essentially the same reasoning used in *Taylor* v. *Louisiana*, 419 U.S. 522, (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Lee* v. *Missouri*, 439 U.S. 461 (1979); and *Duren* v. *Missouri*, 439 U.S. 357 (1979).)

The clear import of the requirements of any "eligibility test" is simple: if there is *no* [final] conviction then the question

of retroactivity is not reached, and the new *constitutional rule applies automatically.*

Under petitioner's theory, *Jenison* should apply to all cases *pending* at the time that *Jenison* was decided. If this Court finds that in fact *State* v. *Jenison* merely restated the law as it was established in *Taylor* (v. *Louisiana*, 419 U.S. 522 (1975)), *State* v. *O'Coin*, 417 A.2d 310 at 312) then *Jenison* is properly applicable to any case in which a conviction was not final on the date *Taylor* was announced (January 21, 1975).

According to the applicable federal case law, as relied upon by the Rhode Island Supreme Court in *O'Coin*, it is the date of the decision announcing the constitutional principle that is crucial, *not* the date of the decision that announces the retroactivity application. (See, *Linkletter* v. *Walker*, 381 U.S. at 639, for example.) Therefore, *O'Coin* is inapplicable to the instant case. The correct application of *Jenison* depends *only* on whether the date of *State* v. *Jenison* or the date of *Taylor* v. *Louisiana* is the controlling date.

The Rhode Island Supreme Court has ruled that a defendant has the right to challenge the composition of the indicting grand jury. *State* v. *Jenison*, 405 A.2d 3 (1979). Indeed, the right to be tried by a jury drawn from a fair and impartial cross-section of the community admittedly is an equal protection and due process right. *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972). Furthermore, the right to a properly composed grand jury is a fundamental aspect of the right to jury trial guaranteed by the Sixth Amendment. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In *State* v. *Jenison*, *supra*, the Rhode Island Supreme Court concluded: "[A] state electing to use the grand jury system must abide by the requirements of due process in assuring that the selection process draws jurors from a fair cross-section of the community." 405 A.2d at 7.

Relying on the rule of *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 530 that court went on to state that to exclude a "[c]ognizable class playing a major role in the community, without a rational reason therefor, impermissibly offends the fair cross-section requirement. . . ." *State* v. *Jenison*, *supra*, 405 A.2d at 8.

Applying these principles, the Rhode Island Supreme Court determined that the system of automatically excluding from the grand jury venire members of the college and university academic community who were entitled to exemption was unconstitutional, *id.* at 10, and that indictments handed down, "by a grand jury composed in violation of constitutional requirements cannot stand." *Id.* This Honorable Court has ruled on the same issue in *Taylor* v. *Louisiana*, *supra*.

Therefore, the denial of the petitioner's right to challenge the unconstitutional composition of the grand jury that indicted him is severely prejudicial, and repugnant to the federal constitution, and the decisions of this Court.

The Rhode Island Supreme Court was also in error by failing to make a ruling that the petitioner did not — and in fact could not — waive his constitutional right to challenge the composition of the grand jury that indicted him.

In *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955), this Court held that "a constitutional right may be forfeited . . . by the failure to make a timely assertion of the right". The petitioner concurs with this decision and indeed did make a timely assertion of that right consistent with the applicable Rule of Criminal Procedure, Rhode Island Superior Court Rules of Criminal Procedure 12(b)(3).

A reading of *Michel* v. *Louisiana*, *supra*, clearly supports the petitioner's position here, since that case discloses that the underlying basis for enforcement of the state [Louisiana] procedural rules was to *determine the controversy prior to trial*.

In *Michel* and its consolidated companion case, the decision was based upon the fact that "Louisiana requires that objections

to a grand jury be raised *before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier.*" (Footnote omitted) (emphasis added). 350 U.S. at 92.

It is undisputed that Rhode Island requires that a motion to dismiss be made no later than twenty-one days after a plea is entered, or in such further time as the court allows.

This Court's interpretation of the applicable state procedural rule in *Michel, supra,* was made in conjunction with another section of the state criminal code which "provides that in any case such objections must be made *before* arraignment." *Michel, supra,* at 350 U.S. 93 (emphasis added). Rhode Island procedure *specifically provides* that these objections be made *after* arraignment. Furthermore, the Louisiana statute *expressly* provided that if the objection was not raised by such procedure, "all such objections shall be considered as waived and shall not afterwards be urged or heard." LSA-R.S. § 15:202, *Michel, supra,* at 350 U.S. 92-93, n.1. Rhode Island has no such express waiver provision, and *does not* require challenge before arraignment, as Louisiana law does.

Clearly, the risk of having to *overturn* an otherwise valid conviction and to *re-try* a defendant years later outweighs the defendant's voluntary waiver of a valid procedural rule having a legitimate purpose. The Court here is not confronted with this issue, since there has not yet been a trial in this case. It is appropriate to note that, in holding that there was a waiver of the right to challenge the grand jury in *Michel,* this Court also stated "[t]his is not to say that the act of fleeing and becoming a fugitive deprives one of federal rights." *Michel, supra,* 350 U.S. at 98.

Research has disclosed no Rhode Island case which enforces a waiver for failure to file a pretrial motion *before* arraignment. In the "waiver cases" decided by the Rhode Island Supreme Court, such as *State* v. *Morin,* 422 A.2d 1255 (1980);

State v. *Byrnes*, 433 A.2d 658 (1981); *State* v. *Barton*, 424 A.2d 1033 (1980); *State* v. *Barton*, 425 A.2d 541 (1981); and *State* v. *Barton*, 427 A.2d 1311 (1981), the waiver was enforced because the defendants failed to file the motion before trial *and* raised the issue for the first time on appeal. In cases like *State* v. *O'Coin*, *supra*, and *State* v. *Rohelia*, 428 A.2d 1064, 1065 (1981), the defendants filed the motion before trial, and the question of timeliness was in the discretion of the trial judge. In both cases, the indictments were necessarily dismissed.

For these reasons the Rhode Island Supreme Court *should not have refused to rule* on the crucial question of the petitioner's "waiver" or "non-waiver" of his constitutional right to challenge the composition of the indicting grand jury.

Conclusion.

Certiorari should be granted to review the decision of the Rhode Island Supreme Court, and that decision should be reversed, and the case remanded to the Rhode Island Superior Court with instructions that the indictments be dismissed.

Respectfully submitted,

ANTHONY M. TRAINI,
LEPPO & TRAINI,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 742-1213

Appendix.

CITE AS, R.I., 448 A.2D 761

STATE

v.

LUIGI MANOCCHIO.

No. 80-132-C.A.

Supreme Court of Rhode Island.

July 23, 1982.

The Superior Court, Providence and Bristol Counties, Rodgers, J., certified questions to the Supreme Court. The Supreme Court, Weisberger, J., held that: (1) defendant indicted in 1969 cannot challenge composition of indicting grand jury for alleged violation of *Jenison* rule that jury selection system that entirely excludes identifiable and cognizable class impermissibly offends fair cross-section requirement, and (2) defendant was not entitled to benefit of retroactive application of *Jenison* rule, even if he otherwise met federal or State criteria for retroactive application of procedural due process right enunciated in *Jenison*.

Questions answered.

OPINION

WEISBERGER, Justice.

This matter is before us pursuant to General Laws 1956 (1969 Reenactment) § 9-24-27 which permits a trial judge to certify certain questions of law to this court. A justice of the Superior Court has certified the following questions for our determination.

> "1. Does a defendant indicted in 1969 have a right, whether it be contained in the fair and impartial jury trial clause or the confrontation clause of the Sixth Amendment to the United States Constitution, or in the due process clauses of the Fifth and/or Fourteenth Amendments to the United States Constitution, or in the equal protection clause of the Fourteenth Amendment to the United States Constitution, or in the provisions of Article I, section 10 of the Constitution of the State of Rhode Island, to challenge the composition of the grand jury that returned the indictment?
> "2. If the defendant has such a right as described in Question 1 above, to challenge the composition of the grand jury that returned the indictment, does he waive that right by voluntarily absenting himself from the jurisdiction prior to arraignment and trial?
> "3. Is a defendant entitled to the benefit of the retroactive application of this Court's decision in the cases of *State v. Jenison* and *State v. Cory*, notwithstanding this Court's decision in *State v. O'Coin*, if the defendant otherwise meets Federal or State criteria for retroactive application of a decision conferring substantive due process rights upon defendants?"

We answer the first in the negative. We do not reach the second question because of our response to question No. 1. We are unable to answer the third question without construing its meaning. As construed, we answer it in the negative.

The facts of the case giving rise to the certification are as follows. On August 14, 1969, a grand jury indicted defendant on three charges connected with the 1969 murder of Anthony Melei. In order to avoid arraignment and prosecution, defendant absented himself from the jurisdiction for some ten years. As a result, defendant was not arraigned until July 6, 1979, at which time he pleaded not guilty. On October 15, 1979,[1] he filed motions to dismiss the indictment. He alleged that the grand jury that had indicted him had been unconstitutionally constituted. Apparently the motions to dismiss rest on the allegation that the grand jury had been drawn from a jury pool from which members of the college and university community had been impermissibly excluded.[2] It was at this point in the criminal proceedings against defendant that the Superior Court justice certified the three questions now before us.

[1] Between the date defendant was arraigned and the date the motions were docketed, we filed our opinion in *State v. Jenison*, R.I., 405 A.2d 3 (1979). In *Jenison* we discussed the right to a grand jury drawn from a "fair cross-section of the

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[1] Upon consideration of stipulations entered into by the state and defendant, the presiding justice had enlarged the time in which these and other motions could be filed.

[2] At the time of the indictment, members of the college and university academic community were entitled to claim an exemption from jury duty. General Laws § 9-9-3, as amended by P.L.1968, ch. 102, § 1.

community." *Id.* at 6-8. We acknowledged that the "fair cross-section" requirement for petit and grand juries was mandated by the due-process and equal-protection clauses of the Federal Constitution, the Sixth Amendment right to an impartial jury, and common law. *Id.* at 6-7; *see, e.g., Castanada v. Partida*, 430 U.S. 482, 492-93, 97 S.Ct. 1272, 1279, 51 L.Ed.2d 498, 509 (1977); *Taylor v. Louisiana*, 419 U.S. 522, 526-33, 95 S.Ct. 692, 696-99, 42 L.Ed.2d 690, 696-700 (1975); *Peters v. Kiff*, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83, 94 (1972); *Carter v. Jury Commission*, 396 U.S. 320, 330, 99 S.Ct. 518, 523-24, 24 L.Ed.2d 549, 557-58 (1970). We concluded that

> "a state electing to use the grand-jury system must abide by the requirements of due process in assuring that the selection process draws jurors from a fair cross-section of the community." *State v. Jenison*, R.I., 405 A.2d at 7.

Relying on the rule announced in *Taylor v. Louisiana*, 419 U.S. at 530, 95 S.Ct. at 697 98, 42 L.Ed.2d at 698, we stated that excluding a

> "cognizable class playing a major role in the community, without a rational reason therefor, impermissibly offends the fair cross-section requirement * * *." *State v. Jenison*, R.I., 405 A.2d at 8.

Applying these principles, we determined that the system of automatically excluding from the grand jury venire members of the college and university academic community who were entitled to exemption was unconstitutional as well as a violation of the pertinent statute. *Id.*, 405 A.2d at 10. We further held that indictments handed down "by a grand jury composed in violation of constitutional requirements, cannot stand." *Id.*

Less than one year after our decision in *Jenison*, we addressed its retroactive implications. In *State v. O'Coin*, R.I., 417 A.2d 310 (1980), we stated that because *Jenison* was based on federal constitutional law, and more specifically the principles enunciated in *Taylor*, *supra*, its retroactive effects must be determined in compliance with federal law governing retroactivity. *Id.*, 417 A.2d at 312.

In 1975, the United States Supreme Court held that *Taylor* may not be applied retroactively to convictions rendered by juries impaneled prior to 1975, the date of *Taylor*. *Daniel v. Louisiana*, 420 U.S.31,

32, 95 S.Ct. 704, 704, 42 L.Ed.2d 790, 792 (1975). In 1979 the Court ruled that where there are "'no new standards' of constitutional law not evident from the decision in *Taylor v. Louisiana* * * *", *a decision could be retroactively applied to juries sworn after the date of the Taylor* decision. *Lee v. Missouri*, 439 U.S. 461, 462, 99 S.Ct. 710, 711, 58 L.Ed.2d 736, 739 (1979) (per curiam). Because we determined in *O'Coin* that *Jenison* "did not announce any 'new standards' of constitutional law not evident from the decision in *Taylor* * * *," we held that

> "the rule in *Jenison* shall apply in the cases of all defendants who were indicted by grand juries impaneled after * * * January 21, 1975, and whose convictions have not become final by the date of this opinion [July 11, 1980]." *State v. O'Coin*, R.I., 417 A.2d at 312.

The *Jenison* rule is not limited to grand juries drawn from a pool that systematically excluded members of the college and

university academic community. The rule, as we have discussed, is that a "jury selection system that entirely excludes an identifiable and cognizable class * * * impermissibly offends the fair cross-section requirement." *State v. Jenison*, R.I., 405 A.2d at 8.

[2, 3] We now turn to the question before us. We read the first certified question as addressing the defendant's right to the retroactive application of the requirement that grand juries be drawn from a fair cross section of the community. Our decision in *O'Coin* therefore controls our answer to this question. As noted, *O'Coin* set forth a two-pronged test for the retroactive application of *Jenison*. To avail oneself of a *Jenison* challenge, a defendant must satisfy both prongs of the test. The grand jury in question must have been impaneled after 1975 *and* the conviction must not have been finalized prior to 1980. It is not sufficient that defendant has not yet been convicted. Our answer, therefore, is that a defendant indicted in 1969, obviously prior to *Taylor*, cannot challenge the composition of the indicting grand jury upon the grounds alleged in this case.

We need not reach question No. 2 because of our negative answer to question No. 1.

[4-8] Question No. 3, in effect, asks whether a defendant can circumvent the retroactive rule of *O'Coin* by relying solely on federal or state criteria for retroactive application of a decision conferring *substantive* due-process rights. The right to be tried by a jury drawn from a fair and impartial cross section of the community admittedly is a due-process right. *See Peters v. Kiff*, 407 U.S. 493, 502, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83, 94 (1972). It is a fundamental aspect of the right to a jury trial guaranteed by the Sixth Amendment. *See Taylor v. Louisiana*, 419 U.S. at 530, 95 S.Ct. at 697-98, 42 L.Ed.2d at 698. As such, it seems clearly to be a procedural due-process

right.[3] *See generally* Nowak, Rotunda, & Young, *Handbook on Constitutional Law* 380-83 (1978). We are unable to determine the relevance of the term "substantive" in the third question as written; consequently question No. 3 essentially replicates the issues posed by question No. 1. We find there is no point in reanalyzing the retroactive effect of *Jenison* independent of *O'Coin*. In *O'Coin* we determined that the retroactivity of the *Jenison* principles was controlled by *Daniel v. Louisiana*, *supra*.

We purposely rejected state retroactivity criteria. The *O'Coin* rule was the product of the application of the federal retroactivity ruling in *Daniel v. Louisiana*, *supra*, to the due-process right articulated in *Jenison* and based on *Taylor v. Louisiana*, *supra*. A reapplication of the principle of *Daniel v. Louisiana*, *supra*, would necessarily yield the same result as that of the

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[3] Generally substantive due process precludes or limits the ability of a legislature or the Congress to enact legislation at all in areas involving certain fundamental rights. *See generally Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); Corwin, *Liberty Against Government passim* (1948). On the other hand procedural due-process requires certain minimal standards of notice, hearing, and opportunity to respond adequately before a governmental agency may effectively deprive an individual of life, liberty, or property. *See generally Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923).

O'Coin opinion. Construing the third question to address the retroactive aspect of the *procedural* due-process right enunciated in *Jenison*, we answer that question also in the negative.

To summarize, we answer questions Nos. 1 and 3 in the negative and do not reach question No. 2. The papers in the case are remanded in the Superior Court for further proceedings consistent with this opinion.

82-989

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

LUIGI MANOCCHIO,
PETITIONER,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief in Opposition to Petition for a Writ of Certiorari.

DENNIS J. ROBERTS, II,
Attorney General of the State of
Rhode Island,
MARGARET R. LEVY,
Special Assistant Attorney General,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Does a criminal defendant, indicted in a capital case in 1969, who fled the jurisdiction for ten years following the indictment, have a procedural right under the Fourteenth Amendment to the United States Constitution to challenge the composition of the grand jury that returned the indictment, where the Rhode Island Supreme Court held in 1979 that the state grand juries empaneled after January 21, 1975 were unconstitutionally composed, but where the case was still pending trial in 1975?

2. If a defendant has such a right, can that right be waived by prolonged voluntary flight from the jurisdiction prior to arraignment?

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Brief in Opposition to Petition for a Writ of Certiorari.

Jurisdiction.

The statute upon which petitioner relies to invoke the jurisdiction of this Court, 28 U.S.C. § 1257(3), does not confer the power of review in this instance. The language of § 1257(3) provides that *final judgments* of the highest court of a state may be reviewed upon a petition for a writ of certiorari. The decision by the Rhode Island Supreme Court in *State* v. *Manocchio*, ____ R.I. ____, 448 A.2d 761 (1982), was interlocutory in nature, and thus outside the scope of the § 1257(3) jurisdictional grant to this Court.

The Rhode Island Supreme Court in *Manocchio* made determinations concerning certified questions of law presented by a justice of the Rhode Island Superior Court. These questions were certified following petitioner's motion to dismiss the indictment brought against him, and prior to a trial on the merits. Upon a negative resolution of the certified questions with respect to the petitioner, the case was remanded by the Rhode Island Supreme Court to the Rhode Island Superior Court for further proceedings consistent with the decision in *Manocchio*. Clearly, these "proceedings" were to encompass not only the denial of the motion to dismiss the indictment, but also the trial of petitioner on the merits.

This Court held in *Joslin Manufacturing Co.* v. *Providence*, 251 U.S. 535 (1919), a civil case, that where the Supreme Court of Rhode Island considered such certified questions and remanded the case to the trial court for further proceedings, the judgment was not final, and the petition for certiorari was dismissed for want of jurisdiction. Further, this Court has often expressed the view that for a judgment to be final, an order to enter a specified judgment or perform a purely ministerial duty on remand must appear from the face of the judgment. *See e.g.*, *Bateman* v. *Arizona*, 429 U.S. 1302 (1976); *Parr* v. *United States*, 351 U.S. 513 (1956); *Berman* v. *United States*, 302 U.S. 211 (1937).

More particularly, in a criminal case, a final judgment is deemed to mean the imposition of sentence. *Bateman* v. *Arizona, supra*, 429 U.S. at 1306. The litigation must be terminated on the merits and the whole matter concluded prior to review, according to *Parr* and *Berman*. As this Court asserted in *United States* v. *MacDonald*, 435 U.S. 850, 853-54 (1978), "The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'" (Citations omitted.)

The instant case is criminal in nature, and the interlocutory decision appealed from does not contain a collateral or separa-

ble issue of the type which this Court has infrequently reviewed as exceptions to the final judgment requirement. *See Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy claim). Where the pre-trial ruling rejecting the double jeopardy claim in *Abney* consisted of a final determination of the rights involved, here, the entitlement of petitioner to indictment by a grand jury representative of a fair cross-section of the community will not be further attenuated by the denial of review until the case has been fully litigated. *See United States* v. *MacDonald, supra*, 435 U.S. at 861. The issue in *Parr* v. *United States*, 351 U.S. 51 (1956), also related to the indictment stage of proceedings; in refusing to find a severable, reviewable issue in the interlocutory appeal, this Court stated that although the petitioner would have to withstand the rigors of trial under the questioned indictment, such was the burden of citizenship, and no review was available.

Therefore, petitioner has improperly invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3), as the decision of the Supreme Court of Rhode Island was interlocutory and the issue non-severable for purposes of review.

Further, petitioner invokes United States Supreme Court Rules 17(1)(b) and (c) in his jurisdictional statement. However, there is no evidence supporting the Rule 17(1)(b) allegation — that the decision of the state court of last resort conflicts with the decision of another state court of last resort or of a federal court of appeals. The petitioner cites no such case in conflict with the decision of the Rhode Island Supreme Court in *Manocchio*.

Constitutional Provisions.

The respondent does not fully agree with the constitutional provisions which petitioner cites in his brief as relating to his case.

The Fifth Amendment right to a grand jury does not apply to state prosecutions. *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Hurtado* v. *California*, 110 U.S. 516 (1884). Therefore, petitioner cannot base any part of his claim on the Fifth Amendment of the United States Constitution.

Statement of the Case.

The respondent substantially agrees with the statement of the case as set forth in the brief of petitioner.

Argument.

I. The Petitioner is Not Entitled to Challenge the Composition of the Grand Jury Which Returned the Indictment Against Him in 1969.

The Rhode Island Supreme Court, in *State* v. *Jenison*, ____ R.I. ____, 405 A.2d 3 (1979), held that the exclusion of the academic community from service on the grand jury was violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Subsequently, the question of the retroactivity of *Jenison* was presented to the Rhode Island Supreme Court in *State* v. *O'Coin*, ____ R.I. ____, 417 A.2d 310 (1980). In *O'Coin*, the Rhode Island Supreme Court determined that *Jenison* was to apply to cases in which the grand jury had been impaneled after 1975 and where the conviction had not been finalized prior to 1980. These dates were derived from the decision of this Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), which

expounded the principles concerning a defendant's right to a jury composed of a fair cross-section of the community, and from the date of *O'Coin* itself (1980). The choice of 1975, the date of the *Taylor* decision, was in accordance with the mandate of *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), that retroactive effect of *Taylor* was to apply to juries sworn after 1975 where no new standards of constitutional law above and beyond those enunciated in *Taylor* were evident. *O'Coin* did not produce any such new standards, but was based on the principles of *Taylor*.

The petitioner asserts that *O'Coin* should not apply in his case because retroactivity is not an issue where his conviction is not yet final. However, *O'Coin* was fashioned to address just such a situation, where the jury may have been impaneled prior to 1975, but no conviction was finalized prior to 1980. The Rhode Island Supreme Court framed its two-pronged test in *O'Coin* in the conjunctive, thus making it clear that both criteria were to be met before a *Jenison* challenge would be appropriate.

Although petitioner cites this Court's opinion in *Linkletter* v. *Walker*, 381 U.S. 618 (1975) to buttress his argument that retroactivity principles only apply to final decisions, he removes the language from the historical context in which this Court was considering the retroactivity of decisions. Although it was formerly held that an unconstitutional action was inoperative and that cases arising under such action were nullities, this Court has long since determined that certain decisions promulgated according to principles subsequently overruled may be law for "intermediate transactions". *Linkletter* v. *Walker*, *supra* at 625. The totality of *Linkletter* is directed toward the formulation of criteria for determining the propriety of retrospective application of rulings invalidating prior activities. The major considerations would involve the "prior history of the rule in question, its purpose and effect, and

whether retrospective operation will further or retard its operation". *Id.* at 629. Moreover, in *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court extended its guidelines for retroactivity to include "the extent to which a condemned practice infects the integrity of the truth-determining process at trial". The three-pronged analysis derived from *Stovall* and set out in *Daniel* v. *Louisiana*, 420 U.S. 31, 32 (1975), combined and amplified the standards for retrospective application of law as "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards", citing *Stovall* v. *Denno*, *supra*. Clearly, this Court has gone far beyond its turn-of-the-century view that cases invalidated by subsequent rulings were null and void. And even though petitioner is willing to agree that most cases finally decided are excluded from retrospective application of subsequent law, the standards referred to above do not readily support the conclusion that pending cases may not also be excluded.

In applying the principles governing retroactivity to petitioner's case, the basis for the Rhode Island Supreme Court's decision in *Jenison* should be examined. In keeping with due process and equal protection principles, the *Jenison* court declared that a grand jury, as well as a petit jury, should be composed of a "fair and impartial" body, because the grand jury "performs the critical function of deciding whether to bring the initial accusation". 405 A.2d at 7. However, once the indictment is returned, the grand jury no longer has any role in insuring the integrity of the fact-finding process, unlike the petit jury. Both *Linkletter* and *Stovall* emphasized the consideration of the infection of the truth determining process by the invalidated practice in evaluating retroactivity. Here, such infection is indeterminate; the grand jury which returned the indictment against petitioner may well have acted fairly, de-

spite its unconstitutional composition. It would seem clear that the "initial accusation" has no effect upon the fairness of the trial itself. The purpose of bolstering the procedural right to a properly constituted grand jury has little to do with the adjudication on the merits. Much like the situation in *Linkletter*, where retrospective application of search-and-seizure law was denied, to allow *Jenison* retroactivity to indictments by grand juries sworn prior to 1975, even where no final convictions exist, would "legitimate" an "extraordinary procedural weapon that has no bearing on guilt [and] would seriously disrupt the administration of justice". *Linkletter* v. *Walker*, 381 U.S. at 637-38.

The particulars of the instant case make the *Linkletter* language especially apropos, where petitioner voluntarily absented himself from Rhode Island for ten years following his indictment. Were respondent compelled to re-indict him at the present time, the charge of conspiracy to murder could no longer be brought against petitioner, in accordance with a three-year statute of limitations. *See* R.I. G.L. 1956 (1981 Reenactment) § 11-1-1 (provision relating to conspiracy charge); R.I. G.L. 1956 (1981 Reenactment) § 12-12-17 (statute of limitations); *State* v. *Patriarca*, 71 R.I. 151, 43 A.2d 54 (1945) (any charge not specifically exempted by statute of limitations is included). Thus, by merely fleeing the state, and later returning to challenge the composition of the grand jury indicting him, a defendant indicted prior to 1975 could effectuate the running of statutes of limitation in his favor. This result hardly seems in keeping with the effective administration of justice, the third prong of the test for the propriety of retrospectivity. Certainly, the values embodied in the right to a properly constituted grand jury are not "measurably served", *DeStefano* v. *Woods*, 392 U.S. 631 (1968), by the retroactive application of *Jenison* to indictments returned prior to the 1975 date of the *Taylor* decision.

In sum, it is apparent that the standards for applying retroactivity in this case beyond those articulated in *O'Coin* have not been met.

II. The Rhode Island Supreme Court did Not Err in Refusing to Determine Whether or Not Petitioner Waived his Right to Challenge the Composition of the Grand Jury.

The Rhode Island Supreme Court did not rule on the second of the questions certified to it by the Rhode Island Superior Court relating to petitioner's waiver of right to challenge the grand jury composition due to his voluntary absence of ten years. The decision in *Manocchio* was determined by the resolution of the first certified question involving the issue of the retroactivity of *Jenison*, and so the Rhode Island Supreme Court properly declined to address the waiver question.

However, assuming that petitioner did have the right to challenge his 1969 indictment, it is arguable that he waived the right through his prolonged voluntary absence subsequent to his indictment. Despite the fact that R.I. Super.R.Crim. P. 12(b)(3) allows the challenge to the constitution of the grand jury within a specified time after the plea is entered, the extended period between indictment and arraignment which is attributable to a defendant may seriously impede the effective administration of justice by causing loss of the right to reindict, as is here the case on the conspiracy charge, and contribute to the unavailability of witnesses. *See Commonwealth* v. *Millhouse*, 255 Pa. Super. 206, 386 A.2d 581 (1978).

In *Michel* v. *Louisiana*, 350 U.S. 91 (1955), which petitioner cites in support of his contention that his flight did not result in waiver, this Court stated: "[D]ue regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquis-

itorial process . . .." *Id.* at 98. *Michel* also points to the specific problems to which a defendant's flight and subsequent challenge to grand jury composition give rise, and which call for the "prompt determination of . . . preliminary matters": "[A] long delay in . . . determination . . . makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories . . . may lose their sharpness." *Id.* at 98 n.5.

Although petitioner may have technically complied with the time requirements for his challenge to the grand jury composition, clearly, such delay between indictment and challenge was never envisioned by the framers of the statutory provision. This is particularly so where the delay was fully attributable to petitioner.

Therefore, it is respondent's position that the Rhode Island Supreme Court did not err in failing to address the waiver question, and that petitioner is in error in concluding that he could not be deemed to have waived his right to challenge the composition of the grand jury which indicted him.

Conclusion.

Therefore, since petitioner has presented inadequate jurisdictional grounds, and is not entitled to challenge the composition of the grand jury which returned the indictment against him either on the basis of lack of retroactivity of *State* v. *Jenison*, ____ R.I. ____, 405 A.2d 3 (1979), or waiver of right to challenge, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

DENNIS J. ROBERTS, II,
Attorney General of the State of
Rhode Island,
MARGARET R. LEVY,
Special Assistant Attorney General,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400